

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7628

To be argued by
JOAN GOLDBERG, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

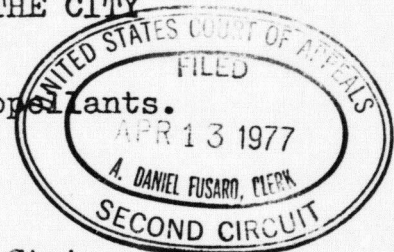
CARMEN IRIZARRY,

Plaintiff-Respondent,

-against-

IRVING ANKER, individually and as
Chancellor of the Board of Education,
JULIUS R. RUBIN, individually and as
Chairman of the Board of Examiners
and THE BOARD OF EDUCATION OF THE CITY
OF NEW YORK,

Defendants-Appellants.



On Appeal from Judgment of the United States
District Court for the Eastern District of New York

(Brief of Appellant)
PLAINTIFF-RESPONDENT'S REPLY BRIEF

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PLAINTIFF-RESPONDENT'S REPLY BRIEF

PRELIMINARY STATEMENT

Plaintiff-respondent, a former licensed teacher of the Board of Education of the City of New York, brought this action, pursuant to 42 U.S.C. Sections 1983, 1985 and 1986, for injunctive relief setting aside the revocation of her teacher's license without a hearing and for reinstatement to her teaching position^{1/} from which she was removed because of her criticism of the bi-lingual program as conducted in District 3 of Manhattan.

^{1/} Which position she held under certificate of competency for which no license is required.

The court below ordered respondent's license reinstated "immediately" and conditioned the license upon completion of a two-credit course in methods of instruction. The court found no merit to her claim of First Amendment violation. Appellants appeal from this judgment.

QUESTIONS PRESENTED

1. Were respondent's due process rights violated by the appellants' refusal to examine the contents of the course respondent alleged was taken in satisfaction of the licensing requirements for a teacher of early childhood education?

2. Were respondent's due process rights violated by the failure to hold a hearing prior to revocation of her license?

FACTS

Respondent commenced this action on or about October 27, 1976 alleging that her teacher's license was revoked in June, 1976 and that she was removed from her teaching position in October, 1976 without a hearing in violation of her due process rights under the Fourteenth Amendment, and that such actions were a result of her criticism of the Board of Education's policies concerning bi-lingual education in violation of her First Amendment rights.

Respondent moved by order to show cause, returnable November 8, 1976. On that date the court held a trial on the merits.^{2/}

Respondent testified that she received a B.A. degree from Lehman College in 1973 and began teaching a bi-lingual fourth grade class in P.S. 166 in Manhattan in September, 1973 pursuant to a certificate of competency. In February, 1974 respondent took the regular licensing examination for both ethnic studies and early childhood education. She passed both examinations.

In April, 1974, the principal of P.S. 166 requested respondent's appointment as a regularly

^{2/} There was no discovery or any pre-trial procedures whatsoever.

licensed teacher of bi-lingual education. She received no response, and respondent continued to teach under her certificate of competency for the years 1974-75 and 1975-76.

Respondent was rated satisfactory as a teacher pursuant to her certificate of competency in the years 1973-74 and 1974-75, and as a substitute teacher in 1975-76.

Respondent testified that, during this period, she was outspoken that the bi-lingual studies should concentrate on teaching the English language because the reading tests were given in English and that Spanish should be taught as a second language. She further testified that, during this period, she was brought upon charges because of her criticism of the program, but that the charges were dismissed.

In November, 1975 respondent was advised that her license as an early childhood teacher of ethnic studies was revoked. Exhibits 2-8 indicate the correspondence between respondent and appellants. Respondent appealed the revocation of license by attempting to show through a written letter from a professor that she satisfied the requirements for such license. In June, 1976 her appeal was denied without a hearing, and in July, 1976 she received a

statement of reasons for the denial. At the trial, two witnesses for the appellants testified that the Board of Examiners did not pay any attention to the appeal, but relied solely on the description of the course in the catalog, regardless of the actual course content.

In September, 1976, respondent returned to P.S. 166 awaiting re-employment under the certificate of competency. In or about the third week of September, she was advised that there was no longer funds for the certificate of competency program and that a regularly licensed teacher was required to be appointed for that class. Mr. Katz, attorney for appellants, advised the court that the certificate of competency program is funded by a Title VII grant from the Department of Health, Education and Welfare and that no funds were available for 1976-77.^{3/}

Respondent testified at the trial that the failure to appoint her under the certificate of competency was because of her criticism of the program

^{3/} This statement is totally inaccurate. The teacher who replaced Ms. Irizarry is unlicensed and is currently teaching pursuant to a federally funded program. This was discovered subsequent to trial.

and alleged that this was a denial of her First Amendments rights. The court, relying on the statement by appellants' counsel that the program was terminated because of lack of funds, dismissed that cause of action.

Respondent testified at the trial that she was unfamiliar with the licensing requirements for the early childhood license, but that she returned to Lehman College and asked one of the advisors at Lehman whether she had completed the requirements for the license. She testified that she was advised that she had completed the eligibility requirements for the license (p. 6).^{5/} Respondent was never appointed under the license, although such appointment was requested by her principal.^{4/} Almost two years later, the Board of Examiners is alleged to have reviewed the transcripts and to have determined that she was missing two points in a methods course.

After receiving said notice, respondent submitted a letter from one of her professors stating that the course he taught to respondent, called "Psychology of Exceptional Children", was taught from the

^{4/} After receiving the license, respondent was considered a substitute teacher (Exhibit 9).

^{5/} Appendix.

vantage point of the general needs of students of the Department of Education, "i.e., theory, methodology, prescription and application for classroom setting." This letter, if credited by the Board of Examiners, would have established eligibility in that it would have been credited as a methods course by the Board of Examiners.

Without notifying respondent that this letter was totally ignored and without any attempt to establish the accuracy of the letter, the Board of Examiners stated, on June 23, 1976 (Exhibit 7):

"Careful consideration was given to the statement and evidence you submitted. However, the Committee was convinced that the substance of your appeal did not justify setting aside the original judgment in this test."

At the trial, witnesses from the Board of Examiners testified that the letter from Professor Peterson was ignored and that they never examine alternate courses (Appendix, pp. 45, 46).

Based on this admission that respondent had no hearing and that the Board of Examiners failed to investigate the truth and accuracy of Professor Peterson's letter, the court held that the failure to consider the actual course content and the failure to hold a hearing, although requested, was a violation

of respondent's due process rights. Respondent's teaching license was ordered reinstated in conditional form, but respondent was ordered to complete two credits in a methods course approved by the Board of Examiners. It is respectfully submitted that the court in holding that respondent was required to take another methods course was overreaching its authority. The court should have reinstated the license and held that the course taken by respondent was equivalent to a methods course based upon the letter written by Professor Peterson.

POINT I

THE EVIDENCE BELOW CLEARLY ESTABLISHED
THAT RESPONDENT HAD NO HEARING PRIOR
TO THE TERMINATION OF HER LICENSE.

Revocation of a license results in the very serious loss of a property right. Since virtually all teaching licenses are conditioned upon completion of certain requirements, it is clear that the licensee must have the opportunity to show compliance with these conditions. This has nothing to do with expectation of employment; it has nothing to do with the right to dismiss a probationary teacher. It is solely based on the fact that a teacher's license is a valuable property right and a person may not be deprived of that property without due process of law. Matter of Baronat, 11 E.D.R. 150 (1972); Matter of Lowenstein, 9 E.D.R. 207 (1970); Spellens v. Community School Board No. 19, 48 A.D.2d 658 (1975). In the case of Matter of Baronat, *supra*, the Commissioner of Education held that:

"...the license has a twofold function. While it is to some extent analogous to a certificate of eligibility for appointment to a civil service position, it further represents formal acknowledgment that the individual possesses satisfactory academic credentials for appointment to education and positions consonant with the scope of the license conferred." (p. 151)

The Commissioner held in that case that cancellation of a license to teach can be effected only after a formal hearing, at which petitioner must be represented by counsel; the procedures offered by Section 105 (a) of the Education Law were considered insufficient specifically for termination under 241(g) of the City Board's by-laws.

In the case of Matter of Lowenstein, supra, the Commissioner held that:

"The right to continued possession of a teacher's license is a valid recognizable property right.... Further the license constitutes the sine qua non for the practice of the teaching profession in respondent's district and represents the end result of many years of training. Cancellation of such a license, unlike termination of a probationary appointment, carries a strong stigma of fault." (P. 208)

The Commissioner's view that a formal hearing is required before termination of a license has been upheld and followed in several later cases, including Greenwald v. Community School Board No. 27, 42 A.D.2d 965 (1973); Matter of Clausen, 39 A.D.2d 708 (1972); Spellens v. Community School Board no. 19, supra; Groopman v. Community School Board No. 24, 49 A.D.2d 906 (1973).

Respondent has lost her license due to a determination by the Board of Examiners that she lacks

two required academic credits in the area of teaching methods, a fact strenuously disputed by the respondent.

It is submitted that it makes no difference as to the reason a license is revoked. The loss of property remains the same. The inability to obtain employment in New York City schools remains the same. The inability of the respondent to prove or assert that she is a qualified teacher is the same.

The respondent has attempted to present evidence to support her contention that she has fulfilled the academic requirements to retain her license. She presented a letter from a professor to substantiate her claim that a particular course she took satisfied the requirements.

In Berns v. Civil Service Commission of New York City, 537 F.2d 714 (2nd Cir. 1976), an employee of the Police Department was summarily dismissed without a hearing under Section 50(4) of the New York State Civil Service Law. That section of the Civil Service Law confers the power to dismiss for lack of a required qualification.

The plaintiff Berns was dismissed for apparently lacking the necessary high school diploma, despite the plaintiff's contention that she possessed an equivalent qualification from the school she had attended in France.

The court found that the plaintiff had acquired a property right in her position based on satisfactory completion of the six month probationary period.

As a result the court held that "summary dismissal without a prior hearing violated Berns' right to due process of law under the 14th Amendment." (P. 716.) The court further held that the Civil Service Commission was required to determine if in fact the plaintiff possessed the necessary qualification.

Based on Berns, respondent herein, who has completed three years of satisfactory service, would have been tenured if she had not had her license revoked.

In a similar case, Cannaielli v. N.Y.S. Dept. of Civil Service, 44 A.D.2d 645 (4th Dept. 1974), the plaintiff, an engineering technician, was summarily dismissed from employment on the basis that he had been ineligible to take the required exam for lack of a geometry course. The plaintiff, as here, had taken and passed the examination required and had rendered one and one-half years of satisfactory service in his position.

The plaintiff claimed, in that case, that a course called "Essentials of Math II", that he had taken prior to the examination, contained the necessary materials on geometry. The Appellate Division held that in construing Civil Service Law Section 50 that:

"...concededly the statute does not mandate a disqualification hearingThis language is broad enough to permit a hearing when such is required by the circumstances of the case. (P. 646.) Under the circumstances, a hearing is required at which petitioner will be afforded an opportunity to present evidence that the college course he took is the equivalent of the required two term course in geometry. Once this decision has been made, the matter can finally be determined."

The respondent in the case at hand, Ms. Irizarry, has taught satisfactorily for three consecutive years.

Her license was terminated without any hearing because she purportedly lacks certain credits which she claims to possess. Her attempts to prove this fact have been ignored by the Board of Examiners and the Board of Education.

Although no statute mandates a hearing on this issue, it is submitted that the case law cited above, the circumstances of the case and the guarantee

of due process under the Fourteenth Amendment, requires that respondent receive such a hearing before her license may be terminated.

POINT II

THE COURT WRONGFULLY DISMISSED RESPONDENT'S CAUSE OF ACTION ALLEGING THAT HER CONTRACT AS A BI-LINGUAL TEACHER WAS NOT RENEWED BECAUSE OF HER EXERCISE OF FIRST AMENDMENT RIGHTS.

Respondent argued that her contract under a certificate of competency was not renewed because she had been openly critical of the education policies and practices of the appellants' bi-lingual program in the district where she was teacher.^{6/}

Appellants argued that respondent's contract was not renewed because the funds came from the Department of Health, Education and Welfare and that such funds were no longer available. This statement was erroneous, and it was only after the trial that the principal and the bi-lingual coordinator in District 3 admitted that the "teacher" teaching the bi-lingual fourth grade class formerly taught by respondent was not a regularly licensed teacher. It is respectfully submitted that, had the court been aware that this

^{6/} Plaintiff possessed a certificate of competency under which she taught.

was another teacher under a certificate of competency, it would have concluded from the respondent's testimony that she was (1) harassed and criticized, and (2) brought up on charges because of her criticism that the teachers in the bi-lingual program were teaching too much Spanish to the children; that the exercise of her First Amendment rights was the actual reason for her dismissal from the school.

Lack of contract and tenure rights is irrelevant where the respondent claims that her position was not renewed because of her criticism of the bi-lingual program. If respondent was denied continued employment because she spoke out against the program, then there was a violation of her First Amendment rights. Roseman v. Indiana Univ. of Penn. at Indiana, 520 F.2d 1364 (3rd Cir. 1975); James v. Board of Education, 461 F.2d 566 (2nd Cir. 1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

POINT III

THE COURT ACTED WITHIN ITS POWER IN RESTORING RESPONDENT'S LICENSE AS A TEACHER

Where a violation of the Constitution is asserted and the aggrieved party proceeds under the Civil Rights Act, 42 U.S.C. 1983, it is the duty of the district court to use its powers in equity to grant such injunctive relief as is necessary to restrain the state from exercising its powers. Woods v. Wright, 334 F.2d 369 (4th Cir. 1969); Sewall v. Pegilow, 291 F.2d 196 (4th Cir. 1961). See, also, Shnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Dixon v. Duncan, 218 F.Supp. 157 (E.D. Va. 1963).

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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April 11, 1977.